IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: CA 11/2015

In the matter between:

G-WAYS CMT MANUFACTURING (PTY) LTD **Appellant**

and

NATIONAL BARGAINING COUNCIL FOR THE

CLOTHING MANUFACTURING INDUSTRY

(WESTERN CAPE SUB-CHAMBER) **First Respondent**

STEPHEN BHANA NO **Second Respondent**

CTWU OBO 58 MEMBERS **Third Respondent**

Heard: **6 September 2016**

Delivered: **08 November 2016**

Summary: Failure to notify liquidator of Close Corporation in liquidation of hearing and joining another employer to the proceedings without notice grossly irregular. Appeal upheld. Award reviewed and set aside and remitted to bargaining council for fresh arbitration on due notice.

Coram: Waglay JP, Landman JA and Savage AJA

Neutral citation: *G-Ways CMT Manufacturing (Pty) Ltd v National Bargaining Council for the Clothing Manufacturing Industry (Western Cape Sub-Chamber) and Others* (LAC**:** CA 11/2015)

JUDGMENT

LANDMAN JA

Introduction

[1] G-Ways CMT Manufacturing (Pty) Ltd, the appellant, seeks to appeal against the order of the Labour Court (Rabkin-Naicker J) dismissing an application to review and set aside an award by an arbitrator, Mr Steven Bhana, acting under the auspices of the National Bargaining Council for the Clothing, Manufacturing Industry (Council), (Western Cape Sub-Chamber), the first and second respondents respectively, alternatively that a rescission ruling be reviewed and corrected or remitted to the Council. The third respondent is the Clothing and Textile Workers Union acting on behalf of 58 of its members.

[2] The appeal is with leave of this Court. The South African Clothing and Textile Workers Union (the third respondent) who referred the dispute to the Council does not oppose the appeal and abides by the outcome of the appeal.

Background

[3] Fifty-eight members of the third respondent and other employees were employed by Greenways CMT Manufacturers CC until they were retrenched on the basis that Greenways had been finally liquidated. When one of the retrenched employees returned to Greenways' premises, it was found that another entity

styled G-Ways CMT Manufacturing (Pty) Ltd (hereafter G-Ways) was conducting the same business on the premises and that some of their co-workers were employed by this entity.

[4] The union referred a dispute relating to the alleged unfair dismissal of 58 of its members, formerly employed by Greenways, to the Council in terms of s 191 of the Labour Relations Act 66 of 1995 (the LRA). In the referral LRA Form 7.11, the employer was cited as Greenways CMT Manufacturers CC (hereafter Greenways).

[5] The dispute was arbitrated on 8 July 2013 before the second respondent. Greenways was not represented at the arbitration. Greenways had been provisionally liquidated on 29 May 2013 and finally liquidated on 26 June 2013. It may be accepted that the liquidator of Greenways was not notified of the date of the hearing. G-Ways was not cited in the referral, nor was G-Ways given notice of the conciliation hearing or the arbitration proceedings.

[6] In his award, the second respondent *mero motu* joined G-ways, in its absence, as a respondent and without giving notice of his intention to do so. Having found that the dismissal of the trade union members was procedurally and substantively unfair, the second respondent ordered Greenways and G-ways, jointly (but not severally) to pay the members the equivalent of six months wages as compensation by 15 August 2013.

[7] When G-Ways learnt of the award, it filed an application to rescind the award to the extent of removing the reference to G-Ways. The application for rescission was predicated on the grounds that G-Ways had never employed the members of the union, nor had it dismissed them.

[8] The arbitrator decided that G-Ways was not a separate entity from Greenways. He refused to rescind the award and gave the following reasons:

> *'Ms Greenway submitted that she was an employee of the first respondent, Greenways CMT CC for many years and then first respondent*

[Greenways] had financial trouble, she opened her own business Gways (Pty) Ltd (sic). She stated that Gways started operating in May 2013 and referred to her supporting documentation as proof. It was further her submission that Gways had no affiliation to Greenways and had not employed or dismissed the applicants. She conceded that Gways operates from the same premises as Greenways.

[Ms] Greenways's supporting documentation included a bank statement for a company. She alleged that she started operating from mid May 2013, yet her bank statement is for the period 14 February 2013 to March 2013. It includes an item for Labour and Payroll. [Ms] Greenways' submissions are therefore not truthful. In addition, it is obvious that there is a family connection between [Ms] Greenway and the owner of Greenways CMT, apparently mother and son. I had also taken cognizance of the fact that [Ms] is Greenway is 79 years and I find it highly improbable that anyone of that age would start a new business. [Ms] Greenway admitted that she had employed some of Greenways' employees but failed to explain how she did this and whether she took over Greenways' contracts, etc. The documentation submitted shows the entity to be G-Ways CMT Manufacturing (Pty) Ltd and not Gway (Pty) Ltd as [Ms] Greenway claimed. It must also be noted that there [are] no supporting papers from the first respondent.

The applicant's submission is fraught with inconsistencies and lacks sufficient details to convince me that [it] is entirely a separate entity. The application must therefore fail.'

[9] The second respondent recorded that it was clear from the rescission application that the correct legal entity had not been properly cited. He then *mero motu* substituted the reference to "G-Ways" with its full description, namely G-Ways CMT Manufacturing (Pty) Ltd.

[10] G-Ways was dissatisfied with the ruling and launched an application in the Labour Court for an order reviewing and setting aside the award, alternatively rescinding the ruling, in the further alternative, remitting the matter to the Council. The grounds for review are essentially the same grounds on which the

application for rescission was made. The union did not oppose the review application.

[11] The Labour Court held that the review application was late but granted condonation. The Labour Court noted that in essence G-Ways wished to substitute Greenways CMT Manufacturing CC as the sole respondent liable for paying the compensation fixed in the award. The Court then dealt with the background facts contained in the award and in the rescission application and then considered the submissions made by G-Ways. The Court said that:

> *'[7] It is submitted on behalf of the applicant [Gways] that the rescission ruling is not one that a reasonable decision-makers faced with the same facts and evidence could reach, that the second respondent unduly joined the applicant as a party to the arbitration proceedings, and unreasonably refused to rescind the award on application. It is also further submitted that second respondent seriously erred in finding that the applicant should be joined without there being any application by the interested party to do so.*
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> *[8] First, a consideration of the rescission ruling record reflects that the second respondent's findings are entirely reasonable. The discrepancies between the documentation and the sworn affidavit by Mrs Greenway are glaring. As is that between her version in the founding affidavit in this matter, and the annexure containing the final liquidation order as referred to above. Furthermore, the arbitrator was within his rights to vary the citation in the rescission ruling. The variation was pursuant to information provided by the applicant and he was entitled to vary it mero motu as a look at the First Respondent's constitution reveals.*
>
> *[9] The applicant has failed to convince this court of its bona fides, which has been sorely lacking throughout the history of this dispute.…'*

The review application was dismissed.

[12] In my view, this appeal must be decided on a procedural basis. The majority judgment of the Constitutional Court in *National Union of Metalworkers of South Africa v Intervalve (Pty) Ltd and Others*[1] held that:

> *'[46] … The purpose of section 191 is to ensure that, before parties to a dismissal or unfair labour practice dispute resort to legal action, a prompt attempt is made to bring them together and resolve the issues between them. Resolving the issues early has benefits not only for the parties, who avoid conflict and cost, but also for the broader public, which is served by the productive outputs of peaceable employment relationships.'*

and

> '*[47] … The general purpose of section 191 provides the background against which the specific purpose of section 191(3) must be understood. The subsection ensures that the employer party to a dismissal or unfair labour practice dispute is informed of the referral. The obvious objective is to enable the employer to participate in the conciliation proceedings, and, if they fail, to gird itself for the conflict that may follow.'*

and

> *'[53]…The fact that the uncited employer has informal notice of the referral cannot make a difference. The objectives of service are both substantial and formal. Formal service puts the recipient on notice that it is liable to the consequences of enmeshment in the ensuing legal process. This demands the directness of an arrow. One cannot receive notice of liability to legal process through oblique or informal acquaintance with it.'*

[13] The Court cautioned that had the corporate forms been fake the decision would have been different. But, there was no suggestion that the separate identity of the three companies was a sham.

[14] There is at least one exception to the requirement that an employer should have been given notice of a conciliation hearing before being joined as a party in

[1] [2015] 3 BLLR 205 (CC).

proceedings concerning another employer. Waglay JP expressed it this way in *Temba Big Save CC v Mlamli Kunyuza and Others*:[2]

> *'[29] Having said that a referral for conciliation is indispensable and a precondition to Commissioner's or the Labour Court's jurisdiction over unfair dismissal disputes means that if a party is not part of the conciliation proceedings it cannot be joined at a later stage. The question that arises however is whether the general principle is applicable in a case a where a dismissed employee, having referred his/her employer to conciliation for an unfair dismissal dispute, later discovers that his/her employer has changed because the business in which they were employed has changed hands.*
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> *[30] In answering this question, the LAC in Intervalve held [at para 16] that:*
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> > *"In Mokoena, the Labour Court allowed the joinder of one of the parties. The party joined was a party that the Labour Court held had taken over the respondent's business in circumstances that invoked s197 of the LRA. In terms of this section where a business is transferred as a going concern the transferee takes over the employment responsibilities of the transferor. The joinder was thus granted not on the basis of any exercise of a discretion of joining a party not taken to conciliation but because s 197(9) of the LRA placed the new employer in the shoes of the old employer. In the circumstances, there was no need to refer both the new and the old employer to conciliation any one would suffice as judgment against one was effective against the other."*
>
> *[31] This quote illustrates that, in the event of a party invoking the provision of section 197 of the LRA, there is no need to refer the old and the new employer to conciliation. Any one of the parties will suffice because in terms of the section, the new employer takes the place of the old employer in all material respects, including but not limited to contracts of employment and any pending litigation. Hence, where the old employer was taken to conciliation there is no need to also take the new employer because one is not dealing with two employers but only one. Clearly, the appellant wrongly interpreted the Intervalve judgments.*

[2] (JA40/2015) [2016] ZALAC 36 (28 June 2016).

[32] In this matter, the employees allege that the appellant has taken over the business of the former employer and for that reason they sought to join the appellant. Since the appellant is alleged to have stepped into the shoes of the old employer it may be joined to the proceedings. I therefore agree with the court a quo's conclusion that in the context of an alleged s197 transfer, a successful applicant would have to hold the transferee accountable because not only has that transferee an interest in the outcome of the dispute, it may be held liable to satisfy the relief, if any, that is granted against the old employer.'

[15] The proceedings in the Bargaining Council however, gave rise to a few material irregularities. The second respondent conducted the arbitration without notice to Greenways which had been placed first in provisional and then final liquidation. It was necessary to substitute the liquidator for the CC.[3] The second respondent *mero motu* joined G-Ways to the award that he made without any notice to G-ways that he intended to do so. This overlooked the *audi alteram partem* rule. Lastly, the second respondent made G-Ways jointly liable with Greenways. If G-Ways is liable for the obligations of Greenways in terms of s197 of the LRA it must be joined to the arbitration proceedings without the need that for it to be taken for conciliation. See *Intervalve*.[4]

[16] These material irregularities mean that the award must be reviewed and set aside and the matter remitted to the bargaining council to be heard afresh, on notice to the liquidator, before another arbitrator. Should the union wish to hold G-Ways liable on the basis of section 197 of the LRA then the union should apply to join G-ways to the arbitration proceedings.

Order

[17] In the result, I make the following order:

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[3] See s 359(2) of the Companies Act 61 of 1973 read with s 66(1) of the Close Corporation Act 69 of 1984.

[4] The judgment of the Labour Appeal Court referred to in *Temba Big Save* is reported as *Intervalve (Pty) Ltd and Another v National Union of Metalworkers of South Africa obo Members* (2014) 35 ILJ 3048 (LAC).

1. The appeal is upheld.

2. The judgment of the court *a quo* is set aside and replaced with the following:

   'The award is reviewed and set aside and the matter is remitted to the National Bargaining Council for the Clothing, Manufacturing Industry, (Western Cape Sub-Chamber) to be heard afresh, on notice to the liquidator, before another arbitrator. Should the union wish to hold G-Ways CMT Manufacturing (Pty) Ltd liable on the basis of section 197 of the LRA then the union should apply to join it to the arbitration proceedings.'

3. There is no order as to costs.

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A A Landman

Judge of the Labour Appeal Court

I concur,

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B Waglay

Judge President of the Labour Appeal Court

I concur,

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K M Savage

Acting Judge of the Labour Appeal Court

APPEARANCES:

FOR THE APPELLANT:

FOR THE THIRD RESPONDENTS: